No. 6116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH WIEN,
Appellant,

vs.

ALASKAN AIRWAYS INC. (a corporation),
Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

This is an appeal from a judgment and order of the District Court of the Territory of Alaska granting to the appellee a temporary injunction enjoining and restraining the appellant from entering into competition in any way with appellee company, and from accepting employment as an airplane pilot from any company other than appellee.

The appellee, Alaskan Airways Inc., referred to hereinafter as Alaskan Company, is a corporation organized and existing under the laws of Delaware with its principal office in that state. Prior to August 6, 1929, it had purchased the business of an airplane common carrier company and was itself conducting

an airplane transportation business in the Territory of Alaska. (Tr. p. 29.) During this time the appellant, Ralph Wien, a resident of the Territory of Alaska, was one of the stockholders in the Wien Alaska Airways Inc., referred to hereinafter as Wien Company, a competing corporation, and was employed by it as a mechanic. (Tr. p. 2.)

On August 6, 1929, the appellee, Alaskan Company, purchased all of the property, assets, and business of the Wien Company, including its good will, for the sum of $65,000.00. (Tr. p. 3.) In connection with such purchase the Wien Company and its stockholders, including the appellant, executed to the Alaskan Company a bill of sale which contained provisions to the effect that for a period of three years from the date thereof they would refrain from entering into competition with it, and from becoming connected with, or accepting employment from, any other company or individual which might enter into competition with the Alaskan Company. (Tr. p. 7.)

At the time this purchase was consummated, namely, on August 6, 1929, the Alaskan Company was, and had been, pursuing its transportation business in the Territory of Alaska. (Tr. p. 29.) Just about at the time of its purchase of the Wien Company, it was negotiating for the purchase, or it had already purchased, certain other airplane companies operating in the Territory of Alaska, with the apparent purpose of acquiring unto itself the entire airplane transportation business in the Territory of Alaska. (Tr. p. 30.)

When the transaction with the Wien Company was consummated, the Alaskan Company was not, as a foreign corporation, qualified to do business in the Territory of Alaska, in accordance with the requirements of the laws of that Territory. It did not comply with these requirements until a considerable time afterward. (Tr. p. 29.)

It is charged in the complaint that the appellant, Ralph Wien, in January, 1930, entered the employ of a certain copartnership carrying on a general airplane transportation business in Alaska, and has been engaged as an aviator and pilot for such copartnership, and continues to carry on his business of flying in active competition with the Alaskan Company's business, to its damage. What the appellee seeks to enjoin in this proceeding is the alleged breach by the appellant of the provisions of the bill of sale purporting to restrict competition. (Tr. pp. 4 and 5.)

The Court's injunction forbids the appellant, Wien, from entering into competition in any way with the Alaskan Company in the conduct of its airplane business in the Second, Third, and Fourth Judicial Divisions of Alaska, and from entering into any business that will conflict in any way with it in the conduct of its airplane business in said Divisions of Alaska, and from becoming interested in any corporation or copartnership engaged in said Divisions in the airplane business, and from accepting employment with any airplane company, corporation, or association, except the Alaskan Company, as pilot, mechanic, or

manager, in the aforesaid Divisions of Alaska. (Tr. pp. 20 and 21.)

The question presented on this appeal is as follows:

Did the District Court have power to grant the temporary injunction restraining the alleged breach by the appellant, Wien, of the contract in question, which contract is illegal and void for the reasons that:

(a) The appellee, Alaskan Company, at the time the contract was made, had not qualified to do business in Alaska as required by the laws of the Territory; and

(b) The provisions of the contract are violative of Federal statutes forbidding undue and unreasonable restraints of trade?

ASSIGNMENT OF ERRORS.

The Court's order granting the temporary injunction herein is erroneous for the following reasons:

(a) The complaint and affidavits of Charles L. Thompson and Ralph Wien before the Court on the hearing for said temporary injunction, the same constituting the entire evidence in the matter, established without dispute that the plaintiff, a foreign corporation, was doing business in the Territory of Alaska prior to and at the time of and at all times after the making of the contract which forms the basis of plaintiff's suit and which was set forth in its complaint as Exhibit "A," and that said contract was made in Alaska with residents of Alaska at a

time when said plaintiff had not complied with the laws of Alaska relative to foreign corporations doing business therein in that said corporation filed its articles of incorporation, its financial statement, and its designation of an agent upon whom service of process might be made in the office of the clerk of the District Court for the division wherein it intended to carry on business, to-wit, the Fourth Judicial Division, Territory of Alaska, on the 12th day of September, 1929, and not before, and it filed said articles of incorporation, financial statement, designation of agent, and paid its corporation tax and other fees required by law in the office of the auditor of the Territory of Alaska upon the 22nd day of October, 1929, and not before, and that, therefore, the contract of August 6, 1929 (Exhibit "A" in plaintiff's complaint), forming the basis of plaintiff's suit, was void and could not be enforced in favor of the corporation under the laws of Alaska, to-wit: Sections 654, 655, and 660, Compiled Laws of Alaska, as amended by Chapter 69, Session Laws of Alaska, 1923; Chapter 32, Session Laws of Alaska, 1923, and Section 6, subdivision 7, Chapter 118, Session Laws of Alaska, 1929.

(b) The affidavits of Charles L. Thompson and Ralph Wien and the plaintiff's complaint in this cause showed that the contract marked Exhibit "A" in plaintiff's complaint and forming the basis of this suit was invalid as creating a monopoly of commerce in freight and passengers in the air by means of airplanes in the Second, Third, and Fourth Divi-

sions of the Territory of Alaska, and invalid as in restraint of trade, and as also indirectly accomplishing the purchase by plaintiff of the stock of corporations then engaged in the same line of business, all in violation of Section 3 of the Sherman Act (U. S. Code, p. 351) and Sections 1 and 7 of the Clayton Act. (U. S. Code, pp. 352 and 353.)

ARGUMENT.

I.

COURTS DO NOT RESTRAIN BREACHES OF ILLEGAL OR VOID CONTRACTS.

As we will hereinafter point out, the contract which constitutes the basis of the injunction is void and cannot be enforced. It is an elementary rule that the breach of void contracts, or contracts tainted with illegality, cannot be restrained by the Courts.

> "He who seeks the aid of equity to enjoin the violation of an agreement, or for the protection of his contract rights, must himself come into court with clean hands * * * nor will equity interfere to enjoin the breach of a contract which is illegal and void as against public policy."
>
> *High on Injunctions,* 4th Ed., Section 1119.

> "An injunction will not issue to prevent the breach of a contract which is for any reason unenforceable, as where the contract is against public policy or is of doubtful propriety * * *"
>
> 32 *Corpus Juris,* pp. 189, 190.

> "Before the court will enjoin a breach of such a contract, there must be no doubt about its validity * * *"
>
> 32 *Corpus Juris,* p. 217.

And particularly a Court will not issue a temporary injunction in a doubtful case where it will cause the defendant greater loss than will be suffered by the complainant.

> "The rule has been frequently laid down broadly that a preliminary injunction will not issue where the right which the complainant seeks to have protected is in doubt, where the right to the relief asked is doubtful, or except in a clear case of right. It has similarly been declared that the right asserted by complainant must be perfectly clear and free from doubt where the effect of a preliminary injunction will be more than merely the maintenance of the status quo, *or where the injunction will cause defendant greater loss and inconvenience than that which would be suffered by complainant in the absence of an injunction,* and that an injunction must be refused if complainant's case is so doubtful that it does not appear reasonably probable that he has the right claimed and that it is being violated * * *" (Italics ours.)
>
> 32 *Corpus Juris,* pp. 36, 37.

> "The general rule is well settled that, when the principles of law on which the right to a preliminary injunction rests are disputed and will admit of doubt, a court of equity will not grant such injunction without a decision of the courts of law establishing such principles, although satisfied as to what is a correct conclusion of law upon the facts."
>
> 32 *Corpus Juris,* p. 40.

II.

THE TERMS OF THE CONTRACT, THE ALLEGED BREACH OF WHICH IS SOUGHT TO BE ENJOINED, ARE VOID UNDER THE LAWS OF ALASKA.

It is undisputed that at all of the times involved in this controversy the complainant was a foreign corporation and the defendant was a resident of the Territory of Alaska. (Tr. pp. 1, 32.) It is further undisputed that the contract containing the terms and conditions, the breach of which is here sought to be restrained, was made and executed on August 6, 1929. (Tr. p. 2.)

As shown by the statements contained in the defendant's affidavit, which also are undisputed, the Alaskan Company, the foreign corporation, was, on August 6, 1929, and prior thereto, "doing business" in the Territory of Alaska as a common carrier, transporting passengers and freight for hire from point to point therein, and did in fact do a general transportation business by airplane within the Territory of Alaska between the first and sixth days of August, 1929, and at all times thereafter, and engaged as a common carrier in carrying passengers and freight for hire from point to point within the Territory of Alaska and from points in Alaska to and from Siberia and Canada. (Tr. p. 30.)

It is further declared in such affidavit, and the fact is undisputed, that the appellee foreign corporation did not file a copy of its charter or articles of incorporation, its designation of an agent upon whom service of process in Alaska might be made, or its financial

statement in the office of the clerk of the District Court, Fourth Division, until September 12, 1929 (Tr. p. 29); nor did it file a copy of its charter or articles of incorporation, financial statement, and designation of agent in the office of the auditor of the Territory of Alaska until October 22, 1929 (Tr. p. 29); nor did it pay the corporation tax and other fees required by law of foreign corporations doing business within Alaska, until October 22, 1929. (Tr. p. 29.)

By the act of the legislature of the Territory of Alaska, Chapter 69, Session Laws of Alaska, 1923, amending Section 654, Chapter 23, Compiled Laws of Alaska, it is provided that

> "No corporation or joint stock company, other than those formed to engage in life, fire, marine, guaranty or other insurance business, organized under the laws of the United States, or the laws of any State or Territory of the United States other than the Territory of Alaska, or the laws of any foreign country, shall do or engage in business within the Territory of Alaska without first having filed in the office of the Secretary of the Territory and in the office of the Clerk of the District Court for the Judicial Division wherein it intends to do or engage in business, the following papers, viz.:
>
> (a) A duly authenticated copy of the charter or articles of incorporation of such corporation or company, and of any amendments thereto,
>
> (b) A statement, verified by the oath of the president, vice-president, or other acting head, and the secretary of such corporation or company, and attested by a majority of its board of directors or, if said board of directors consists of more than five members, by not less than three members of said board, showing:

(1) The name of such corporation or company and the location of its principal office or place of business without the Territory and, if it is to have any place of business or principal office within the Territory, the location thereof;

(2) The amount of the capital stock of such corporation or company;

(3) The amount of the capital stock of such corporation or company actually paid in in money;

(4) The amount of the capital stock of such corporation or company paid in in any other way than in money and in what;

(5) The amount of the assets of such corporation or company and of what such assets consist and the actual cash value thereof;

(6) The liabilities of such corporation or company and, if any of its indebtedness is secured, how secured and upon what property.

(c) A certificate, under the seal of such corporation or company and the signature of its president, vice-president, or other acting head, and its secretary, if there be one, certifying that such corporation or company has consented to be sued in the courts of the Territory upon all causes of action arising against it in the Territory and that service of process may be made upon some person, a resident of the Territory, whose name and place of residence shall be designated in such certificate; such agent to reside in a city, town or community in said Territory wherein a Clerk of the District Court, Deputy Clerk of the Court, United States Marshal, or Deputy United States Marshal, maintains an office. Such service, when so made upon such agent, shall be valid service upon such corporation or company * * *."

(Subdivision 7 of Section 6 of Chapter 118, Session Laws of Alaska, 1929, merely prescribes that the Auditor shall perform and discharge all of the duties and

functions imposed upon the Secretary of the Territory mentioned in the foregoing act.)

Chapter 32, Session Laws of Alaska, 1923, amending Section 660, Chapter 23, Compiled Laws of Alaska, provides as follows:

> "If any corporation or company shall fail to comply with any of the provisions of this Chapter, all contracts made by such corporation or company with residents of the Territory of Alaska, made in the Territory, shall be void as to the corporation or company, and no court of the Territory shall enforce the same in favor of the corporation or company."

All of these provisions of the laws of the Territory of Alaska were in full force and effect at the time the contract involved in this controversy was executed.

It cannot be disputed that at and prior to the execution of the contract the Alaskan Company was "doing business" within the Territory of Alaska within the accepted meaning of that term recognized by the Courts. Indeed, the very transaction itself evidenced by the contract, the purchase of the stock, business and assets of the Wien Company, constituted an act of "doing business" in and of itself. (*Central Life Securities Co. v. Smith*, 236 Fed. 170.) Add to this the further facts that the Alaskan Company had been actually engaged in transporting freight and passengers within the Territory, and had also purchased the business and assets of other air transportation companies, and the conclusion is inescapable that this foreign corporation was actually "doing business" in the Territory of Alaska when the contract was made.

It may possibly be urged by the opposing counsel that in a situation of this kind, the nullity or illegality of a contract which has already been fully executed cannot be urged. We desire to remind the Court that the particular provisions of the contract now claimed to be void and illegal, and upon which the injunction is based, are purely executory. The restraints imposed upon the defendant were to continue for a period of three years. By this proceeding the complainant is seeking to enforce future compliance with those terms. Obviously a contract may be partly executed and partly executory. (13 *C. J.* 245.) In the instant case, that part of the contract having to do with the purchase and conveyance of the stock, business, property, and assets is already executed. On the other hand, that part of the contract pertaining to the attempted restraint against future competition is purely executory. It is alleged that Wien is violating, *and threatens to continue to violate,* these particular provisions. (Tr. p. 4.) Indeed, the whole purpose of the preliminary injunction is to prevent a future breach thereof during the three year period. Therefore, under these conditions it can not possibly be said that this contract has been completely executed and, that, therefore, the appellant is prevented from urging its illegality.

We particularly call the Court's attention to the Territorial statute which makes this contract void. (pp. 9-10, this Brief.) It does not merely impose a penalty upon a foreign corporation for failing to qualify; it specifically declares that all contracts made by an unqualified corporation with residents of the

Territory, made in the Territory, *shall be void* as to the corporation, and that no Court of the Territory shall enforce the same in favor of the corporation. The intent of the legislation could not possibly be clearer or more definite.

We are aware of the contrariety of opinion upon the general question as to whether contracts made by unqualified foreign corporations are void or voidable. This conflict in the authorities, however, happens only by reason of the difference in wording of various statutes on the subject which have come to the attention of the Courts.

In *Thompson on Corporations* (2nd Ed., Section 6707), the author says:

> "Under some statutes prohibiting foreign corporations from doing business until they have complied with the requirements imposed by such statute, any contracts made without having complied with the statutory provisions are held to be absolutely void, and the statute is enforced no matter how harsh its provisions may be."

There can be no doubt that the District Courts in Alaska have recognized that such contracts are void. In *Burr v. House,* 3 Alaska 641, in which the effect of the Alaska statute was considered, the Court said:

> "That foreign corporations doing business in Alaska should comply with local requirements is beyond question, and the letter of the law, and the penalties contained in sections 228 and 231 of the Code of Alaska for failure to comply with the said requirements, will be enforced when brought to the attention of the court in proper pleadings.
>
> It is manifest from the reading of these sections of our Code, that Congress, in order to

> secure compliance by foreign corporations with its terms, made such compliance precedent to the right of any such corporation to do business within the territory, imposed a penalty for non-compliance, and further closed the doors of courts therein to such corporations for the enforcement of any contract arising while not so complying with all the specified requirements."

It will be noted in the above cited decision that, although the defense of lack of qualification of the foreign corporation was disallowed solely because it had not properly been pleaded, nevertheless the effect of the statute was clearly announced and the defense held to be good when sufficiently urged.

In re Craig Lumber Co., 6 Alaska 356, the statute in question was considered. The contract there was not made with a resident of Alaska, and, not being within the express prohibitions of the statute, was held not to be void. But the Court took occasion to say that:

> "It is only where a foreign corporation which has failed to comply with the statutory requirements deals with a citizen of Alaska *that the contracts are void*, and the court is enjoined not to enforce the same in favor of the corporation." (Italics ours.)

Again, in *Alaska Siberian Nav. Co. v. Polet,* 7 Alaska 374, the Court took occasion to announce the following:

> "A foreign corporation brought suit in the district court, without alleging its compliance with the Alaska statute requiring it to file its articles of incorporation, etc., in the office of the Secretary of the Territory, etc. *Held,* the court may take judicial notice of this want of averment, *and such failure renders contracts made with res-*

> *idents of the Territory, in the Territory, void, and that no court of the Territory shall enforce the same in favor of the corporation."* (Italics ours.)

Cobb v. McDonald-Weist Logging Co. (Alaska), 278 Fed. 165, is an Alaska case in which this Court held that a contract made by an unqualified foreign corporation could not be void because the other party to the contract was not a resident of Alaska. But it is clear that this Court recognized the force and effect of the Alaska statute when it said:

> "Comp. Laws of Alaska, 1913, Section 660, *avoiding contracts* with a citizen of that district by a foreign corporation or company failing to comply with statutory provisions as to filing statements or certificates, has no application, where neither of the parties to the contract was a citizen of Alaska * * *." (Italics ours.)

And, likewise, in *Ross-Higgins Co. v. Protzman et al.* (Alaska), 278 Fed. 699 at 702, this Court indicated its view of Section 660 when it said:

> "To adjudge a contract *wholly void* under Section 660 as to the corporation, it must clearly appear that the contract was made with a citizen of the district." (Italics ours.)

In *Dunn v. Utah Serum Co.* (Utah), 238 Pac. 245, the Utah statute was under consideration, the language of which with respect to the points involved here is almost identical with the Alaskan statute. In denying the foreign corporation any relief under the contract, the Court, among other things, said (at p. 251):

> "Where it is made to appear that any foreign corporation, except an insurance corporation, is

> doing business within this state within the meaning of Section 945, without having complied therewith, every contract whatsoever made or entered into by or on behalf of such corporation within this state, or which is to be executed or performed within this state, *is wholly void on behalf of such corporation.* * * * The statute strikes down every contract and transaction whatsoever made or had within the state by such corporation. The language of section 947 includes all transactions whatsoever, the first contract as well as the last, implied contracts as well as those which are expressed, and excludes the idea that such a corporation may pick out any particular contract made within the state and claim any rights under or sue upon it." (Italics ours.)

In the last cited case, the Court took occasion to discuss the contention of the foreign corporation that the other party was estopped from urging the terms of the statute by the equitable principle that he had accepted benefits from the corporation. As to this contention the Court said:

> "We cannot apply this equitable principle in the instant case because to do so would violate that provision of the statute which declares that no offending foreign corporation shall have the right to sue or maintain any proceeding in the Courts of this state on any claim, interest, or demand arising or growing out of any transaction had within this state. The language of Section 947 is so broad and so rigid as to close against this appellant every possible avenue of escape, resulting in an injustice to it which the Court is powerless to avoid."

In *re Springfield Realty Co.* (Michigan), 257 Fed. 785, the Michigan statute was involved, which declared that a foreign corporation was not capable of making a valid contract in that State until it had

fully complied with the requirements of the act. The Court held that a contract made by an unqualified foreign corporation was absolutely void.

It seems clear that the weight of authority is to the effect that where the statute plainly says so, contracts made by unqualified foreign corporations are void. In some jurisdictions, such contracts are held to be null; in others, the corporation is prevented from maintaining any action thereon; in others, they are held to be void, even though the statute contains no express provision to that effect.

See

12 *Ruling Case Law,* pages 80 and 81, and Citations in Notes;

14a *Corpus Juris*, page 1294 et seq., and Notes.

A few more of the comparatively recent decisions on the subject are the following:

Bothwell v. Buckbee, Mears Co., 275 U. S. 274;
Flinn v. Gillen (Missouri), 10 S. W. (2d) 923;
Hemphill v. Orloff (Michigan), 213 N. W. 867;
Langston v. Phillips (Alabama), 89 So. 523.

We recognize that in certain instances the question sometimes arises as to whether or not the contract is void or voidable. Some Courts have used these terms interchangeably, which has had a tendency to create some confusion. This question, however, is of no importance here since the record presents a case where, to give any effect to the statute at all, is to hold the contract void. The parties to the original contract are here before the Court, and the defendant, at the first opportunity afforded him to do so,

sets up and urges the defense of lack of qualification of the foreign corporation. Since the statute explicitly declares that such an unqualified corporation shall not be permitted to stand upon such a contract, and the Court is abolutely without power to enforce the same, the contract is, to all intents and purposes, completely void "as to the corporation."

Even by those Courts which have held that the contract is not void but voidable, it is recognized and conceded that when the unqualified corporation sues upon the contract, the defendant has a perfect defense under the statute. In *M. S. Cohn Gravel Co. v. Southern Surety Co.* (Oklahoma), 264 Pac. 206, the defendant was not permitted to urge the defense because he had theretofore sued upon the contract itself, and had thus failed to assert its invalidity. At the same time, however, the Court, among other things, said:

> "Section 5435 gives every citizen who contracts with a foreign corporation, prior to the corporation's having complied with the law and received a permit to transact business within this state, a complete defense against the enforcement of such contract, if he desires to claim it. But if the contract is founded on a meritorious consideration, as in this case, and the citizen of the state does not repudiate the contract and claim the defense given him by the statute, but, on the contrary, both parties invoke the contract as the basis of their rights and obligations, who should be permitted to plead the statute? The answer is, 'No one.' Under the latter section, the corporation must domesticate before it can bring its suit, *and even then the citizen has a perfect defense against the enforcement of the contract by invoking the statute.* This construction fulfills the purpose of the statute and is in accord with many respectable authorities." (Italics ours.)

Likewise in *Tarr v. Western Loan and Savings Co.* (Idaho), 99 Pac. 1049, the Court sustained the right of the other party to the contract to urge against the unqualified foreign corporation its failure to observe the statute respecting its qualification to do business in the State. The Court there said:

> "On the other hand, appellants (the other party to the void contract) had a perfect right under the statutes and repeated decisions of this court to plead in defense of the action to foreclose the corporation's noncompliance with the statute."

III.

THE ILLEGALITY AND NULLITY OF THE CONTRACT ARE SUFFICIENTLY SHOWN.

In the written opinion of the learned District Judge, which is contained in this record (Tr. pp. 33 et seq.), it appears that the Court saw fit to attack the sufficiency of the averments set forth in defendant's affidavit in opposition to the granting of the injunction. We respectfully submit to this Court, however, that the comments of the learned District Judge upon the sufficiency of the defendant's affidavit, are wholly unjustified. As an example of this, we call attention to the statement in the Opinion that the allegation in the affidavit that the Alaskan Company was "doing business" in the Territory is a mere conclusion of the affiant. The affidavit distinctly states that the Alaskan Company—

> "Did in fact as a common carrier transport passengers and freight for hire from point to point within the Territory of Alaska, and did in fact do a general transportation business by air-

> plane within the Territory of Alaska, between the first and sixth days of August, 1929, and at all times thereafter * * * and engaged as a common carrier in carrying passengers and freight for hire from point to point within the Territory of Alaska, and from points in Alaska to and from Siberia and Canada." (Tr. p. 30.)

It is difficult to understand how the fact of "doing business" by the foreign corporation in the Territory could be better pleaded. Is it not a pure statement of fact to say that the foreign corporation was engaged as a common carrier in transporting passengers by airplane from point to point within the Territory? Let it be borne in mind that this declaration is undisputed by the complainant.

Again, the defendant has set forth in his affidavit the fact that the foreign corporation did not conform to the conditions of qualification until after the execution of the contract. He does this by stating that the corporation *did qualify* and conform to the statutory requirements, *but not until September and October, subsequent to the making of the contract on August 6th.* Let it again be borne in mind that these statements are undenied by the complainant. These particular averments in the affidavit are assailed by the District Judge upon the ground that they are made by "an airplane pilot or mechanic or sometimes manager of an airplane corporation, who is also the defendant in this suit." (Tr. p. 44.) It seems that the Court below holds these statements to constitute mere hearsay testimony. Even admitting this for the sake of the argument, is it justifiable, when facts are thus brought to the attention of the Court, sufficient

to raise questions of law making the complainant's right to a preliminary injunction extremely doubtful, for the Court to utterly close its ears to such established facts, undenied, and in fact admitted by the complainant, and thereby completely deprive a party in litigation of a complete legal defense? If there had been the slightest denial of these averments by the complainant; if the nature of the facts were such as to require the highest class of evidence to prove the same; or if, after suggestion from the Court, the defendant had failed to satisfy the Court as to the class of evidence which it might see fit to require, then the situation might be somewhat different.

The leaning of the District Court is also shown by the following statement in the Opinion (Tr. p. 42):

> "What particular act did plaintiff do? Whom did plaintiff transport by air for hire, and when? Where did such alleged transportation take place? What alleged freight was carried, and when and where? What were the terms of such alleged contracts of hiring? Was anything of value paid by anybody for the alleged services and when? Did the plaintiff authorize such transportation?
>
> "It is further said that the plaintiff 'held itself out to the general public as being a common carrier in the business of transporting passengers and freight by air from point to point in Alaska,' and the Court asks similar questions with reference to this conclusion of law.
>
> "It is further said that the plaintiff 'did in fact as a common carrier transport passengers and freight for hire.' Did the plaintiff transport the passengers and freight by airplanes or otherwise?"

Apparently, the trial Court conceived that a proper allegation in the affidavit should have been about as follows:

> "That on the 2nd day of August, 1929, at or about 10 o'clock A. M. of said day, plaintiff corporation, then and there the owner and in possession of an airplane, did use the said plane for the purpose of carrying, and did actually carry, therein, one case of eggs for an individual named John Smith, said case of eggs weighing 15 lbs., at and for the price of ten cents per pound, from A in Alaska to B in Alaska, which freight charge was paid by said John Smith to said plaintiff corporation and accepted by it."

Such allegation, in the view of the trial Court, should have been followed by others concerning other cases of eggs, or merchandise, of other consignors.

The mere statement of such allegation in detail is sufficient to show the absurdity of requiring the facts to be set forth as in a criminal indictment.

We submit, the allegation in the affidavit that the plaintiff "did in fact as a common carrier transport passengers and freight for hire" is sufficient.

This allegation of fact was undisputed *and the ultimate fact was the only one before the Court.* We cannot conceive of what difference it could possibly make whether the "doing business" by the plaintiff company was in carrying for hire on a certain day and for a certain individual, a case of eggs, or some other and different merchandise; or whether or not it was from A to B in Alaska, or from C to D in that Territory.

We feel it our duty to say to this Court that the attitude of the learned District Judge, as indicated

in his opinion, appears to have been calculated to nullify a perfect defense, the facts establishing which are admitted to exist by the other party to the litigation.

The defendant is also criticized for failing to interpose a verified answer to complainant's complaint. Such was entirely unnecessary.

> "Affidavits may be used in opposition to the motion for an injunction, whether made by defendant or others, and although no plea or answer has been interposed."
>
> 32 *Corpus Juris,* pages 354, 355.

In its complaint the plaintiff saw fit to eliminate any allegation as to its qualification as a foreign corporation *prior to the time it entered into the contract.* If it had set forth the true fact, the defendant could have interposed a demurrer or motion to dismiss, and must have prevailed thereon. However, since the complaint contained no allegations of fact raising the question of law upon which the defendant depends for a defense, it became necessary for the defendant to set up those facts by his own sworn affidavit. We know of no rule of pleading in injunction cases which prevents this or holds it to be improper.

We believe that with respect to the particular statute in question, Section 660, Compiled Laws of Alaska, the Courts, wherever it has come up for consideration, have indicated that contracts made by foreign corporations in violation thereof are void as to the corporation, and that the Courts are without power to enforce the same where the record shows

that the defendant has a right to rely, and does rely, upon the defense given him by the statute.

IV.

THE CONTRACT IS VIOLATIVE OF THE FEDERAL STATUTES FORBIDDING UNDUE AND UNREASONABLE RESTRAINTS OF TRADE.

The particular terms of the contract, the breach of which is sought to be enjoined, are as follows:

> "That neither said corporation nor any of the stockholders thereof will, for a period of three years from the 6th day of August, A. D. one thousand nine hundred twenty-nine, enter into competition in any way with party of the second part herein; that the parties of the first part will not enter into any business that will conflict in any way with the party of the second part in the conduct of its business, and will not become stockholders or have any interest in any other company or copartnership, and will not enter into any agreement with any individual for the establishment, operation, conduct, or management of any business that will compete with the business of party of the second part, and will not, during said period, within the Territory of Alaska, accept employment with any airplane company, corporation, or association, and will not associate themselves with any individuals who may be engaged commercially in conducting any business that would in any way compete with the business of party of the second part, and will not assist in the organization of or be interested in any business within the Territory of Alaska, during a period of three years from the 6th day of August, A. D. one thousand nine hundred twenty-nine, that would compete in any way with the business conducted by the party of the second part." (Tr. pp. 8, 9.)

It is alleged in plaintiff's complaint that prior to the execution of the contract, the defendant, Wien, was a stockholder and an active member of the Wien Company, and that he was employed by said company *as a mechanic.* (Tr. p. 2.) The particular act on the part of the defendant charged by the complaint is that:

> "The said Ralph Wien, on or about the tenth day of January, 1930, entered into the employ of and associated himself with one Percy Hubbard and one A. Hines, co-partners doing business under the name and style of the Service Motor Company, at Fairbanks, Alaska, and carrying on a general transportation of passengers and freight between points in Alaska, and that, ever since the said tenth day of January, 1930, the said Ralph Wien has been engaged as aviator and pilot of an airplane for said copartnership, and, in violation of his said promises and agreements, continues to carry on the business of commercial flying, in active competition to the business of this plaintiff, to the damage of plaintiff." (Tr. pp. 4, 5.)

By the temporary injunction granted by the District Judge, it is provided:

> "That the defendant Ralph Wien be enjoined and restrained during the pendency of this action and until the final determination thereof from entering into competition in any way with the plaintiff in the conduct of its airplane business in the Second, Third, and Fourth Judicial Divisions of Alaska, and from entering into any business that will conflict in any way with the plaintiff in the conduct of its airplane business in said Divisions of Alaska, and from becoming interested in any corporation or copartnership engaged in said divisions in the airplane business, and from accepting employment with any air-

> plane company, corporation or association, except the plaintiff company, as pilot, mechanic, or manager in the aforesaid Divisions of Alaska." (Tr. pp. 20, 21.)

The defendant contends that the particular terms of the contract above set forth, and which the Alaska Company induced the parties of the second part to sign, are violative of the Federal statutes prohibiting the stifling of competition. In the first place, that particular provision of the contract now under consideration is prohibited by the so-called "Sherman Act," Section 3 of which reads as follows:

> "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any *Territory* of the United States or of the District of Columbia, * * * is declared illegal." (Italics ours.)

The laws of the Congress of the United States are effective in the Territories belonging to the Federal Government. (United States Constitution, Section 3, Article 4.) Consequently, the "Sherman Act," and also the "Clayton Act" hereinafter referred to, are effective in the Territory of Alaska, *not only with respect to matters having to do with interstate commerce, but also to all local matters which are embraced within the meaning and intent of those statutes.* (See *Thornton's Treatise on the Sherman Act,* Section 306a.) It follows, therefore, that every contract in restraint of trade or commerce, made in the Territory of Alaska, is illegal.

We are mindful of that branch of judicial decision to the effect that upon the sale of a business, including its good will, the purchaser, if the contract so

provides, may be required to agree not to act in derogation of that good will. The general rule, however, extends just so far and no further. Unbridled and unlimited restrains upon the seller are never permitted, and the purchaser may exact only such a degree of restriction as is fair and just and necessary for his reasonable protection.

> "While the sale of a business and the surrender of the good will pertaining thereto, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of a business, and not as a device to control commerce, is not within the federal Anti-Trust Law * * * the imposition of a restraint greater than necessary to afford fair protection to the legitimate interests of the purchaser, or contractor, constitutes an unreasonable restraint under the Sherman Act. Shawnee Compress Co. v. Anderson, 209 U. S. 423."
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> *United States v. Great Lakes Logging Co.,* 208 Fed. 733 at 742.

Let us briefly consider what is attempted by the provisions of the contract here. The defendant was one of a number of stockholders of a corporation engaged in the business of airplane transportation. He was employed as a mechanic in that corporation; and the reasonable inference is that such employment was the principal, if not the sole, means of his earning a livelihood. The corporation sold its business and assets and the good will connected with that, the corporation's, business.

We do not argue that the purchaser may not exact an agreement from the seller corporation itself not

to thereafter compete with the purchaser, nor that the stockholders individually may not agree to refrain from reorganizing and associating together as a corporation or association for the purpose of carrying on a competing business. We may even go further and admit, for the sake of the argument, that the individual stockholders may, within reasonable limits, agree not to individually control or manage a business in competition with the purchaser's business. In the instant case, however, the defendant merely went to work for another concern, known as the Service Motor Company, as an aviator and pilot of an airplane for that company.

There is no showing whatever on behalf of the complainant as to how its business is in any way affected by Wien's taking employment with the Service Motor Company as one of its aviators and pilots. There is no allegation that because Wien acts as a pilot for the Service Motor Company such fact in and of itself creates competition with the Alaskan Company which otherwise it would not have if another and different pilot operated one of the Service Motor Company planes. It does not necessarily follow that because Wien flies one of the ships of that concern such fact gives to the public any evidence of his former connection with the seller corporation, where, as a matter of fact, he was a mechanic, or affects in the slightest degree the business of the purchaser. It is alleged in the complaint that Wien continues to act as such aviator and pilot in active competition with the business of this plaintiff, to the damage of the plaintiff. But if the Alaskan Company suffers any detriment

at all by the simple fact of Wien's being employed by the Service Motor Company, it could as well suffer such detriment if any other aviator or pilot took the job, and this no doubt (in fact we are so advised) has actually happened.

Incidentally, the complainant makes no showing of the elements of value of the good will. It may be urged that the complaint alleges that a consideration of $25,000.00 was paid by the purchaser for the good will. Yet, for all that the complaint and affidavit show, Wien may have received but an infinitesimal part of that alleged consideration, or none at all.

To be entitled to a preliminary injunction, a complainant must make a satisfactory showing that it is suffering, or is likely to suffer, irreparable injury from the acts of the defendant. The necessity of the injunction should appear clear to the Court.

> "An injunction, being the 'strong arm of equity,' should never be granted except in a clear case of irreparable injury, and with a full conviction on the part of the court of its urgent necessity."
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> *High on Injunctions*, 4th Ed., page 36.

All of which, we submit, has a direct bearing upon the question of the reasonableness of the provisions of the contract and the fairness of the terms of the injunction. We believe that when a Court undertakes to restrain a party from pursuing his vocation, it should have presented to it a clear case, free from doubt as to the necessities for protection, and as to the legal propriety therefor. Bearing in mind the undisputed facts of the situation here presented, does

it seem reasonable or fair for the Court to order the defendant, even for the period of the pendency of this action, to desist from accepting employment with an airplane company, corporation, or association, as a pilot?

In considering the legality of the contract and the reasonableness and fairness of the injunction, there should be borne in mind the background of facts plainly showing that, just at the time the contract was made, this complainant was engaged in a plan—and we do not hesitate to call it a conspiracy within the terms of the Federal statutes—to restrain trade and stifle competition in the airplane transportation business in the Territory of Alaska. It is not denied that immediately prior to the making of the contract the complainant had purchased the Bennett-Rodebaugh Airplane Company, and was in the act of purchasing the Anchorage Air Transport, Inc. Undoubtedly all this was pursuant to a general design to buy up all of the airplane transportation companies then operating in the Territory. The contracts in connection with these purchases were identical in terms with the contract here involved. (Tr. p. 31.) These facts are not denied by the complainant, the only denial being that the contract forming the basis of this action was not entered into by the plaintiff for the purpose of creating a monopoly of the airplane business in Alaska. The undisputed fact exists that the contract involved here was one of the elements of the plan on behalf of the complainant to buy up all the stock of all of the airplane businesses in the Territory of Alaska. These circumstances add a further taint of

illegality to the contract which is sought to be enforced here. It is in direct contravention to the terms of the Clayton Act, which provides that:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."
>
> *U. S. Code,* Title 15, page 220.

Lest there be any doubt about the intention of the Alaskan Company in pursuing this plan, we call attention to one of the provisions of the contract, which is as follows:

> "That it is understood that the transfer by party of the first part is a transfer of all its assets and good will, both of itself as a corporation and of its stockholders, and its agreement not to enter into competition with the party of the second part or its successors in interest, is a part of the consideration for the purchase by party of the second part of the assets and good will of the party of the first part. * * *
>
> That in construing this agreement, it is understood that the party of the second part will be engaged in the aviation business, carrying passengers and freight for hire, and that the agreement on the part of the parties of the first part to refrain from entering into any business that would compete with party of the second part refers to said aviation business and business incidental thereto." (Tr. pp. 10, 11.)

The language of the Court in *United States v. Great Lakes Logging Co., supra,* is significantly applicable to the situation presented here. The Court, among other things, said:

> "Likewise the restrictions upon competition imposed in the case of all the joint operating contracts referred to were greater than necessary for the protection of the Towing Company's legitimate business interests at the *local service* points covered by such contracts. No more effective method could well be devised for unifying the towing interests in question than by combining in one corporation the stocks of a large number of other corporations creating such a comparatively vast capitalization and influence. Such unification, unexplained, justifies a presumption of an intent to dominate and control the towing facilities. Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. The fact that the policy of the Towing Company's promoters was to buy out competitors, rather than to buy new tugs, and by competition compel the loss to other tug owners of their property, does not tend to negative an intent to create a monopoly. Such course, as avoiding expensive competition, was entirely consistent with an intent exclusively to occupy the field. A wicked purpose to wreck the property and business of those men engaged in towing is not essential to a violation of the statute."

See also

United States v. Southern Pacific Co. et al., 259 U. S. 214;

Aluminum Co. of America v. Federal Trade Commission, 284 Fed. 401.

Citations will no doubt be produced of numbers of instances where purchasers of businesses and the good

will appurtenant thereto have been protected against competition from the sellers thereof. We recognize that it has been declared to be the policy of the law to protect a purchaser in his interests, but we most emphatically insist that this can only be done within proper and reasonable limits, and the Courts will not permit restraints to go beyond the spirit and intent of those statutes which are designed to curb the practice. There are no indications known to us that the Courts, whenever the matter has come under their consideration, have shown any disposition to wink at violations of the Federal statutes prohibiting unreasonable restrains and the suppression of competition, particularly when such statutes are clearly operative within a territory and no question of interstate commerce is involved. We believe that this record presents a case of conspiracy to kill off competition within a certain field of business activity in the Territory of Alaska, and to concentrate the whole of that business in the hands of one foreign corporation. As a prominent incident to the illegal plan, this complainant has exacted a contract from this defendant, purporting to compel him to desist from any manner of competition with their monopoly, even to the extent of depriving him of a means of earning his living, the pursuit of which is not in any way shown to injure the complainant. The temporary injunction sustains the whole design, and substantially operates to deprive this defendant of the privilege of even acting as an airplane pilot in Alaska.

CONCLUSION.

For the reasons set forth above, we ask this Court to dissolve the temporary injunction. We sincerely believe that there is no escape from the conclusion that the terms of the contract involved herein, the breach of which is sought to be prevented by the injunction, are void and unenforceable by any Court in favor of the complainant, not only for the reason that such complainant is impotent and has not the capacity to demand the relief which it seeks, but also for the reason that the provisions of the contract relied upon by the complainant are unjust, unfair, and illegal.

Dated, San Francisco,
May 17, 1930.

Respectfully submitted,
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